

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 8430

United States Court of Appeals

DISTRICT OF COLUMBIA

CARL H. BIVEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

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UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
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BRIEF FOR THE APPELLEE

COUNTER-STATEMENT OF THE CASE

This suit, brought March 22, 1937, to enforce a right alleged to have accrued on July 1, 1923, was dismissed by the District Court (Appellant's Appendix, pp. 1-2, 14) upon the ground that it is barred by the limitation provisions in Section 19, World War Veterans' Act (*infra*, p. 4).

The appellant contends that the limitation invoked against him by the District Court was suspended and in support of this contention asserts a pendency of claim in the Veterans' Administration from June 6, 1925, to August 14, 1936. The Government contends that the case was properly dismissed by the District Court and takes issue with appellant's contention insofar as it asserts that the claim sued on was pending in the Veterans' Administration prior to March 3, 1931.

The Government points out in this connection that prior to March 3, 1931, the only communications relative to insurance received by the Veterans' Administration from the appel-

lant related to an administrative award of \$1.91 per month upon \$332.58 insurance revived under Section 305, World War Veterans' Act, by compensation uncollected on January 31, 1925, when, according to findings made by the Veterans' Bureau, upon its own motion, the insured became permanently totally disabled. This correspondence, initiated by the Veterans' Bureau and relating solely to a benefit now in course of payment and not in dispute, did not serve to apprise the Bureau of any claim of entitlement to any benefit other than that awarded administratively, and it may not, therefore, be relied upon as suspending the limitation upon the claim asserted in this action.

The appellant's yearly renewable term insurance lapsed on September 30, 1918, for nonpayment of premiums after he was discharged from military service (Appellant's Appendix, p. 5). In April 1925, the Veterans' Bureau found that the appellant became totally permanently disabled on January 31, 1925, and that he then had uncollected compensation sufficient to revive his term insurance in the amount of \$332.58, payable in monthly installments of \$1.91 each. Notice of the findings was given to the appellant and a form was provided to him for making claim for insurance benefits. The form was executed and returned by him on June 6, 1925, and on July 13, 1925, he was notified that an award in his favor in the amount of \$1.91 per month from January 31, 1925, had been made under the provisions of Section 305 of the World War Veterans' Act (Appellant's Appendix, pp. 5-6, 16-17). Payments under that award have been made regularly and are not now in dispute (Appellant's Appendix, p. 28).

On April 27, 1927, the appellant wrote to the Bureau as follows:

I am drawing \$1.91 cents insurance monthly. I should greatly appreciate it if you will explain to me how this award was made. It do not understand it. It seems to me that in view of the fact that I paid premiums on ten thousand dollars of insurance during the war, I should receive a better award than this.

Thanking you for the explanation requested, I remain.

(Appellant's Appendix, p. 18.)

In reply, the Bureau wrote the following letter to appellant on May 9, 1927:

Receipt is acknowledged of your letter of April 27, 1927, wherein you make inquiry with reference to the insurance installments of \$1.91 per month which you are now receiving.

Please be advised that the records of this office indicate \$10,000 insurance policy which you applied for while in the service lapsed on account of the nonpayment of premiums due, but a portion of this insurance was revived under Section 305, World War Veterans Act. Commencing from the date of your permanent, total rating which was January 31, 1925, this insurance will run in monthly installments of \$1.91 until the expiration of twenty years from January 31, 1925.

It was determined by the Bureau that you had uncollected compensation at the date of your permanent total rating in the amount of \$18 and this amount was used to revive \$332.58 of your insurance.

It is trusted this explanation sufficiently answers your inquiry with reference to the insurance in this case and you may be assured that any further information you may desire in this connection will be gladly furnished upon request.

(Appellant's Appendix, p. 19.)

On March 3, 1931, the Bureau received the following letter written by the attorney for appellant:

This ex-service man has just spoken to me to try to collect for him his War Risk Insurance.

He enlisted on July 22, 1918, at Louisville, Ky., and was discharged on August 28th, 1918, under certificate of disability. He has been drawing total and permanent disability compensation since 1925.

In looking through his file, I find a letter from the Regional Office at Louisville, dated June 23rd, 1925, in which letter receipt is acknowledged of Form #579. This soldier does not recall the execution of a claim under this form, but evidently it must be in the files.

It seems that on May 9th, 1927, you advised this soldier that under Section 305 of the War Veteran's Act, he was entitled to \$332.58 on his War Risk Insurance, and you have been paying him \$1.91 per month since that date. He never knew until we looked up this correspondence why he was getting this \$1.91 per month.

I am enclosing you power of attorney executed by Mr. Bivin, authorizing me to act for him as his attorney.

I would be glad if you would furnish me with a copy of Form 579 receipt of which was acknowledged by the Regional Office in letter of June 23rd, 1925. I want to file a claim for this soldier for the amount of his War Risk Insurance, but before doing so, I would like to have furnished me the above requested information.

Yours very truly,

(Signed) HENRY F. TURNER.

(Appellant's Appendix, pp. 19-20.)

Formal claim for insurance thereafter filed was finally denied by the Board of Veterans' Appeals on August 14, 1936. The present suit was brought on March 22, 1937. The complaint alleges that the appellant became totally permanently disabled on July 1, 1923, and that his insurance was revived on that date instead of January 31, 1925, as found administratively.

POINTS RELIED UPON BY APPELLEE

1. The proof does not sustain appellant's contention that the statute of limitations on his right to sue upon the claim here asserted was suspended from June 6, 1925, to March 3, 1931.

2. The merits of the plaintiff's claim may not properly be passed upon by this court.

STATUTE INVOLVED

Section 19 of the World War Veterans' Act, as amended July 3, 1930 (38 U. S. C. 445-445d), provides in pertinent part as follows:

In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insur-

ance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States * * *

No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930, whichever is the later date, * * *: *Provided*, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further*, That this limitation is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon and the denial of said claim by the Administrator of Veterans' affairs. * * *

* * * * *

The term "claim," as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits, and the term "disagreement" means a denial of the claim by the Administrator of Veterans' Affairs or someone acting in his name on an appeal to the Administrator (Section 445).

* * * the term "denial of the claim" means the denial of the claim after consideration of its merits (Section 445d).

SUMMARY OF ARGUMENT

I

No claim for the benefits sued for was filed prior to March 3, 1931, and the suspension of limitations resulting from the filing of claim on that date was not sufficient to make the present suit timely. If it were assumed, as the plaintiff contends, that the claim sued on was filed in the Veterans' Bureau on June 6, 1925, the resulting suspension of the limitation would have terminated on July 13, 1925, and the statute would

have run from the latter date until the assertion of claim on March 3, 1931. Such suspension would not be sufficient to make the present suit timely.

The decisions relied upon by appellant relate to continued negotiations regarding one claim and are clearly distinguishable from the present case, in which the claim filed in 1931 is sought to be connected over six years of nonaction with correspondence regarding an insurance benefit awarded in 1925, and thereafter regularly paid.

II

The merits of the appellant's claim may not properly be considered by this court because (1) suit not having been timely instituted, the court lacks jurisdiction, and (2) the District Court did not decide the merits of the claim and, hence, no ruling in that respect is presented for review.

ARGUMENT

I

The facts do not sustain appellant's contention that the running of limitations was suspended from June 6, 1925, to March 3, 1931

A suspension of the limitation from March 3, 1931 to August 14, 1936, which is conceded by the Government, is not sufficient to make the present suit timely. Without any suspension the suit would have been barred on July 3, 1931 (Section 19 of the World War Veterans' Act, *supra*), and since, therefore, four months of the time remained when claim was filed on March 3, 1931, it was incumbent upon the appellant to bring suit within four months after final denial of the claim on August 14, 1936. More than seven months expired before suit was brought on March 22, 1937. The contention that the running of the statute was suspended prior to March 3, 1931, by reason of the pendency in the Bureau of a claim filed on June 6, 1925, is not supported by the facts.

It was made clear in *Burns v. United States*, 101 F. (2d) 83 (C. C. A. 2d), that determination of whether a claim for veterans' insurance has been filed in the Bureau and, if so,

whether it has been denied, is properly to be made in accordance with the conclusions reasonably to be drawn from all the circumstances and application of that doctrine by this court is illustrated by the decisions in *Rosario v. United States*, 106 F. (2d) 844, and *Whiting v. United States*, 122 F. (2d) 196. In the former it was held that continued suspension of the limitation, although the claim had been denied, resulted from continued negotiations regarding the claim following the denial. In the latter it was held that acceptance without protest by the insured of a benefit administratively awarded established an agreement between the insured and the Bureau that no greater benefit was payable, although there had been no express denial of any greater benefit.

The circumstances in the present case may not reasonably be regarded as establishing, we submit, the alleged pendency in the Bureau of the claim sued on earlier than March 3, 1931.

The claim filed by the appellant on June 6, 1925, invoked no administrative consideration of his entitlement to insurance, but served only to support an award of the benefits to which he had been found entitled before the claim was filed, benefits which were allowed and accepted by the appellant without protest. (Cf. *Whiting v. United States*, 122 F. (2d) 196 (App. D. C.), *supra*.) Appellant did not then assert, as he does in this suit, that he became totally permanently disabled on July 1, 1923, or upon any other date. He merely acquiesced in the administrative finding that he became totally permanently disabled on January 31, 1925. For lack of anything to indicate, prior to March 3, 1931, that any additional or different benefit was sought, there was nothing before the Bureau to consider and there can be no suspension of the limitation when there is no claim before the Bureau either to be granted or denied (*Stender v. United States*, 75 F. (2d) 579 (C. C. A. 8th); *Berntsen v. United States*, 41 F. (2d) 663 (C. C. A. 9th); *Werner v. United States*, 86 F. (2d) 113 (C. C. A. 2d); *Wilson v. United States*, 70 F. (2d) 176, 179 (C. C. A. 10th); *United States v. Collins*, 61 F. (2d) 1002 (C. C. A. 4th)).

Even if it were assumed, as appellant contends, that the claim here sued upon was filed in the Bureau on June 6, 1925, the

suspension of limitations thereby invoked would have terminated when final action regarding it—the award and acceptance without protest by the appellant of a lesser benefit—was taken on July 13, 1925, and the running of the statute would have commenced again and would have continued to run until the assertion of claim on March 3, 1931¹ (*Neely v. United States*, 115 F. (2d) 448 (C. C. A. 4th); *Simmons v. United States*, 110 F. (2d) 296 (C. C. A. 4th), rehearing 111 F. (2d) 618; *United States v. Kelley*, 110 F. (2d) 922 (C. C. A. 8th), certiorari denied, 311 U. S. 669; *Ball v. United States*, 101 F. (2d) 272 (C. C. A. 6th), certiorari denied, 308 U. S. 563; *Sullivan v. United States*, 116 F. (2d) 576 (C. C. A. 6th); *Burns v. United States*, 101 F. (2d) 83 (C. C. A. 2d), *supra*).

Appellant relies upon cases in which the Bureau action purporting to dispose of a claim was questioned by the claimant and continued negotiations followed in the nature of a rehearing (*Rosario v. United States*, 106 F. (2d) 844 (App. D. C.), *supra*; *United States v. Bollman*, 73 F. (2d) 133 (C. C. A. 8th)). They are plainly distinguishable from the present case, in which the Bureau's final action disposing of the question of the appellant's entitlement to insurance in July 1925 was followed by six years of nonaction by the claimant, as distinguished from continued negotiations, ultimately terminated by the assertion of claim on March 3, 1931, rather than a request for any action regarding a claim earlier asserted.

Upon rehearing, in *Simmons v. United States*, 111 F. (2d) 618, *supra*, the Circuit Court of Appeals for the Fourth Circuit pointed out the decisive difference between diligent pursuit of a claim as shown by the facts of the *Rosario* case and nonaction by the claimant of the character shown by the facts of

¹ A suspension from June 6 to July 13, 1925, would be of no benefit to the appellant. The statute provides alternative periods of limitations—six years from the claimed date of the maturity of the insurance, or one year from July 3, 1930. Since the latter is most favorable to the appellant, he must show, in addition to the conceded suspension after March 3, 1931, further suspension during the one-year period from July 3, 1930 (*United States v. McQuilkin*, 88 F. (2d) 476 (C. C. A. 7th), certiorari denied, 301 U. S. 683; *United States v. Arditto*, 86 F. (2d) 787 (C. C. A. 6th); *Brown v. United States*, 57 F. (2d) 889 (D. C. N. Y.)).

this case. In *United States v. Kelley*, 110 F. (2d) 922 (C. C. A. 8th), *supra*, in which the plaintiff sought, as is attempted in the present case, to avoid the effect of an extended period of nonaction, the court did not refer to its earlier decision in the *Bollman* case. Presumably, in its consideration of the *Kelley* case, the court regarded the *Bollman* case as plainly distinguishable without discussion of it or even reference to it.

II

The merits of the appellant's claim may not properly be considered by this court

We believe that the court may not properly consider the merits of the appellant's claim, and that discussion of the merits is improper because (1) the right to sue upon the claim is barred and, hence, the court is without jurisdiction, and (2) since the District Court did not pass upon the merits of the claim, no ruling in that respect is presented for appellate review.

However, since, despite these considerations, the appellant has discussed the merits of his claim, we assume that it is proper to point out that the cases cited by him as clearly showing his entitlement to the benefits sought are available to the Veterans' Administration as authority for awarding such benefits upon termination of litigation. The administrative construction of the statute, in accordance with which claims like that here asserted were once denied, was held to be erroneous in the cases cited by appellant. It may be assumed that in the administrative award of benefits the judicial construction of the law is now followed. Assuming that appellant's contentions are correct, the question regarding the merits is not whether the claim will be paid, but only whether the payment will be under a judicial or an administrative award. For failure to sue timely the judicial remedy is not available to him.

CONCLUSION

We respectfully submit that the District Court correctly held that the right to sue on the claim asserted by appellant is

barred by the statute of limitations, and that the judgment should be affirmed.

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DECEMBER 1943.

